Supreme Court, U.S.
FILED

MAY 3 2002

No. 02-873

In The

Supreme Court of the United States

HARRY D. HOSKINS, III, Individually and as Representative of A Class of Formosan Termite Victims; MRS. HARRY D. HOSKINS, III Individually and as Representative of A Class of Formosan Termite Victims,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the court below erred in ruling that under the Federal Tort Claims Act, prescription began to run, even though plaintiff had not even a hint that he was a tort victim, much less the identity of the tortfeasor; and made this ruling despite it being in direct conflict with prior decisions of the Ninth Circuit (Simmons v. U.S., 805 F.2d 1363 (9th Cir. 1986)), the D.C. Circuit (Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984)), and itself (Ware v. United States, 626 F.2d 1278 (5th Cir. 1980));

Whether the court below erred in failing to apply the discovery rule for commencing running of the period of prescription to the Federal Tort Claims Act (FTCA) and acknowledging it only as applying to the Federal Employers' Liability Act;

Whether, under the FTCA, the notice which must be present, to commence the running of prescription, is an awareness of sufficient facts to identify a particular cause of action;

Whether, in the absence of anything giving rise to suspicion of a tortious cause of damage, a victim has the legal duty to investigate cause; and

Whether, when claims of a class existed prior to 1966, its members are still required to first go through administrative adjudication?

LIST OF PARTIES

Harry D. Hoskins, III
Individually and as
representative of that
class of Formosan Termite
victims sustaining damages
prior to 1966
Mrs. Harry D. Hoskins, III

Plaintiffs

United States of America

Defendant

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The court of appeals' opinion (per curiam, Higginbotham, Wiener and Barksdale) affirming the district court grant of summary judgment (Appendix A) is not published. The order of the court of appeals denying rehearing (Appendix B) is unpublished The district court's opinion (per Berrigan, D.J.) granting defendant's summary judgment (Appendix C) is unpublished.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on November 21, 2001, and denied rehearing on February 5, 2002. Petitioners invoke this Court's jurisdiction under 29 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2671 *et seq.* (Federal Tort Claims Act)

STATEMENT OF THE CASE

1. After World War II, the U.S. transported on ships into New Orleans war equipment and related items from the Far East infested with Formosan Termites. Over time, the U.S., despite knowing of this Formosan Termite presence and its transfer to the public, spread infested objects out into Orleans Parish and other vulnerable areas of Louisiana, transferred such items to third-parties, and moved infected materials from one to another of its various facilities and other locations in the continental United States. The result was widespread infestation, with resulting damage to private and public property.

The U.S. warned no one and took no significant actions to minimize the damage which resulted from its conduct, despite warnings and alerts from the entomological community over the years..

2. The result of this conduct was that plaintiffs - among many others - suffered substantial Formosan Termite damage to a real property wooden structure, as did all members of the class.

3. The infested World War II materials were initially stored at U.S. Army Camp Leroy Johnson in New Orleans and began spreading out from that location shortly after being brought there in 1945. The inescapable conclusion is that this infestation had spread throughout the New Orleans and surrounding areas/States prior to the effective date of the 1966 amendment to the Federal Tort Claims Act.

Thus, significant class member claims arose prior to the requirement of an exhaustion of administrative remedies as a prerequisite for class joinder.

4. Even though it knew this damage was occurring, the United States continued to spread infested material throughout the country and has never engaged in meaningful

damage control.

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. *First*, Fifth Circuit's judgment is contrary to decisions of the Ninth and District of Columbia Circuits, as well as one previously made by the Fifth Circuit itself, concerning the type of notice required to commence of the running of prescription, which decisions were that a plaintiff must know facts giving notice of the particular cause of action at issue, not just any cause of action; and that there is no duty to investigate the existence of a cause in the absence of information commonly known or self-evident which gives rise to suspicion.

A critical piece of evidence from below is the Statement of Undisputed Facts offered by applicant Harry D. Hoskins, III as part of opposition to the motion for summary judgment, with two of its entries being the following:

> 9. Mr. Hoskins did not know of any connection between FORMOSAN termites and the damage to his property, and the US government. until he learned of such just before he filed his claim.
>
> 10. Mr. Hoskins could not have learned of such through diligent inquiry, because the average person perceives FORMOSAN termites as an act of nature, having no connection to the US government.

I. THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IS CONTRARY TO DECISIONS BY THE NINTH AND DISTRICT OF COLUMBIA CIRCUITS, AS WELL AS ONE IT PREVIOUSLY MADE.

The Fifth Circuit decision herein below in two ways

creates a Circuit contradiction in interpretation of important principles. First, it limits the Dubose v. Kansas City S. Ry. Co., 729 F.2d 1026 (5th Cir. 1984) application of the discovery rule to wrongful-death cases involving an occupational disease brought under the Federal Employers' Liability Act and refuses to apply it to the Federal Tort Claims Act (FTCA); however, the discovery rule has no such limitation on application and very definitely applies to the FTCA. United States v. Kubrick, 444 U.S. 111, 122, 100 S.Ct. 352, 62 L.Ed. 1282 (1949).

This limitation is contrary to the Ninth Circuit decision in Simmons v. U.S., 805 F.2d 1363 (9th Circ. 1986), where the rule was applied to an FTCA claim of wrongful sexual victimization by an Indian health service counselor, where realization of injury did not arise within two years of the conduct but rather was delayed until a psychiatrist informed the victim that the counselor's conduct had caused her injury. Likewise, it is contrary to decision of the U.S. Court of Appeals, D.C. Circuit, in Hobson v. Wilson, 737 F.2d 1 (D.C.Cir. 1984), an FTCA case wherein it was ruled that the "notice" which must be present to commence tolling is "an awareness of sufficient facts to identify a particular cause of action," with the court stating:

> While the precise standard for notice that amounts to constructive discovery and triggers the statute of limitations is not precisely delineated, for our purposes the contours are sufficiently clear. For one, the plaintiff must know facts giving notice of the particular cause of action at issue, not of just any cause of action.
>
> .....
>
> Second, plaintiff's knowledge of the

> grounds for a suit must generally extend to an awareness of the persons responsible for plaintiff's injury. We by no means imply that a plaintiff may postpone suit until he knows every defendant by name and title. However, simply because a person knows he has been injured by one person cannot reasonably mean he should be held to know of every other participant.[1]

Likewise, the Fifth Circuit's decision herein contradicts that court's prior ruling in Ware v. United States, 626 F.2d 1278 (5th Circ. 1980), wherein plaintiff's cattle were killed after a Department of Agriculture failure to diagnose tuberculosis, and prescription under the FTCA was ruled not to have commenced running until plaintiff obtained knowledge of the diagnosis failure.

Plaintiff Ware had no reason to suspect the TB diagnosis as erroneous and so was ruled to have no obligation to investigate the cause. TB was thought by him to come from nature, and the obligation to investigate did not arise until he was informed of the government's diagnosis failure. At that point, his obligation to investigate commenced, and prescription began to run.

However, herein the Fifth Circuit imposed the obligation to investigate, despite the absence of anything at all giving rise to suspicion.

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[1]Hobson v. Wilson, 737 F.2d 1, 35, 36 (CCA D.C. 1984); emphasis added. At bar, the Hoskins did not know they had been injured by a legal person of any identity or type but rather believed that Formosan Termites were an element of nature with presence in no way caused by any human-related entity.

As per entries 9 and 10 of the Statement of Undisputed Facts (quoted on page 2 above) entered in opposition to respondent's motion, movers knew nothing of the connection of the U.S. government to the Formosan termites' presence, nor could they have learned of same, because the average person views this pest as an act of nature, unconnected to the government.

Had any reason whatsoever been present for the Hoskins to suspect any cause other than Mother Nature for the presence of Formosan termites, then a duty of investigation would have arisen; however, no generally known clues existed which indicated that over fifty years before, actions by the U.S. Government were responsible for the termites' presence. Thus, in accordance with the prior ruling of the Fifth Circuit, plus those of the Ninth and District of Columbia Circuits, due to the absence of grounds for suspicion, the duty to investigate did not arise, and the running of the prescriptive period did not commence.

II. WHEN CLAIMS OF A CLASS CAME INTO EXISTENCE BEFORE 1966, MEMBERS MAY BE REPRESENTED WITHOUT FIRST GOING THROUGH ADMINISTRATIVE ADJUDICATION.

The Courts below refused to allow certification of Harry Hoskins as a representative of the class of those citizens who sustained termite damages, ruling that exhaustion of administrative remedies was a prerequisite for each member of the class; however, although correct if the claims herein had all arisen after 1966, they did not so arise, and this proceeding is entitled to class action certification.

In summary judgments, all reasonable inferences are

considering that at Camp Leroy Johnson in New Orleans massive amounts of termite-infested military equipment was left to fester immediately after World War II, it is reasonable to infer that the FORMOSAN termites spread throughout the New Orleans metropolitan area during the twenty years which elapsed prior to the effective date of the 1966 FTCA amendment. Consequently, there were class members located in that area who suffered termite damage prior to 1966, and so they possessed their claims for termite infestation and damage prior to the effective date of the 1966 amendment. They could not sue on their claims, because the federal government's responsibility was unknown to the public; however, had they known, they could have sued individually or brought a class action directly in United States District Court, without making precursor administrative claims.

Many of the potential claimants sustained damages within the first twenty years of infestation, and thus their claims were subject to assertion prior to 1966 and the efficacy of the 1966 FTCA amendment relied upon by the Courts below; therefore, they are qualified to be members of the class without first filing administratively.

CONCLUSION

THEREFORE, Petitioners Harry D. Hoskins, III and Mrs. Harry D. Hoskins, III, Individually and as Representative of A Class of Formosan Termite Victims, request of this Court that it GRANT a writ of certiorari to the United States Court for the Fifth Circuit.

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